SUPRE

No. 72-1503

MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1972

SEARS, ROEBUCK AND CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioner ("Sears") brought this suit in the district court to enjoin the Board's General Counsel from conducting a hearing on an unfair labor practice complaint which had issued based on charges filed by Sears. Sears contended that the General Counsel's refusal to grant its request for certain "Advice and Appeals memoranda" which are prepared by the General Counsel's Office in Washington to guide the Board's Regional Offices in their decisions as to when to issue complaints was contrary to the Freedom of Information Act, 5 U.S.C. 552, and that Sears would be irreparably injured by participating in the scheduled hearing without

these memoranda.[1] The district court issued the injunction requested by Sears (Pet. App. A8-A9).

The court of appeals summarily reversed (Pet. App. A1-A5). It agreed with the district court that there is jurisdiction to enjoin agency proceedings pending resolution of a Freedom-of-Information-Act claim, but it held that such jurisdiction had been improperly exercised here, since "we do not have a cogent showing, indeed we do not see a substantial showing, of how Sears will be irreparably harmed in its participation in the unfair labor practice charge without the Advice and Appeals memoranda whose disclosure is still under judicial consideration" (Pet. App. A4). Sears' petition for rehearing, and for a stay of the judgment, was denied by the court of appeals *en banc* (Pet. App. A7).[2]

2. Sears' basic contention is that the withholding of information by an agency in violation of the Freedom of Information Act results in such irreparable injury that the agency proceeding must be enjoined until the information is furnished, even though there are other

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[1] In addition to the present injunction suit, Sears brought an action in the district court under the Freedom of Information Act, 5 U.S.C. 552(a)(3), to compel production of the requested Advice and Appeals memoranda. The district court ruled in Sears' favor (Pet. App. A10-A15); that case is now before the court of appeals on the Board's appeal (Pet. App. A4, n. 4).

[2] On May 17, 1973, the Chief Justice denied Sears' application for a stay of mandate pending disposition of the petition for certiorari, without prejudice to the renewed motion for a stay which Sears, alternatively, had filed with the court of appeals. The same day the court of appeals, although acknowledging that a stay was "contrary to fundamental principle and the public interest in expeditious disposition by the Board, and without real likelihood of necessity to protect [Sears] from irreparable injury," granted a stay until this Court ruled on the petition for certiorari or recessed for the summer, whichever first occurred.

adequate means for redressing that wrong. Even assuming, contrary to the government's position in *The Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, No. 72-822, that the Freedom of Information Act authorizes the district court to enjoin agency proceedings as a means of enforcing that Act, the court of appeals correctly concluded that that Act does not override the settled principle of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, that "it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue" (Pet. App. A3).

The court of appeals correctly held that no showing of "extraordinary circumstances" was made here. As the court stated (Pet. App. A4): "It may be that Sears will be held entitled to the documents under the Information Act, and it may be that its possession of those documents will be a convenience, indeed a significant help, in its litigating stance. But those considerations are of a different order from the kind of irreparable injury required to interrupt an administrative proceeding." See *Myers* v. *Bethlehem Shipbuilding Corp., supra,* 303 U.S. at 51-52. For, the court added (*ibid.*): "Should Sears' claim to the memoranda be upheld on appeal and should it appear that there was significant adverse impact on Sears in the unfair labor practice charge proceedings because it was denied timely disclosure, an appropriate remedy can be fashioned by the Board, or by the court of appeals with jurisdiction of the petition for review or enforcement in the event the Board issues an order."[3]

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[3] Section 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. 160(e) and (f), provides for review of final Board orders in the courts of appeals.

Finally, the holding of the court below that the judicial review procedures of the National Labor Relations Act (n. 3, *supra*) adequately protect a person against prejudice resulting from a denial of material which he may be entitled to under the Freedom of Information Act accords with the decision of the only other court that has considered the question. *Sears Roebuck and Co.* v. *National Labor Relations Board,* 433 F. 2d 210 (C.A. 6). See, also, *Vapor Blast Manufacturing Company* v. *Madden,* 280 F. 2d 205, 209 (C.A. 7); *Chicago Automobile Trade Association* v. *Madden,* 328 F. 2d 766, 768-770 (C.A. 7); *Polymers, Inc.* v. *National Labor Relations Board,* 414 F. 2d 999, 1005-1006 (C.A. 2), certiorari denied, 396 U.S. 1010.

3. Contrary to Sears' contention (Pet. 7), the instant case does not present "a crucial component of the issue raised in" *The Renegotiation Board* v. *Bannercraft Clothing Co., Inc.,* No. 72-822. As shown (*supra,* p. 3), the basic issue in *Bannercraft* is whether the Freedom of Information Act authorizes a district court to enjoin agency proceedings as a means of enforcing a claim for documents made by litigants before the agency. Even if this Court were to conclude, as did the court below (Pet. App. A3), that the district courts have such jurisdiction, the denial of relief here would still be proper. For, as the court of appeals stated, this "case lacks the requisite showing that access to the documents is necessary to avoid irreparable harm to Sears" (Pet. App. A4).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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